

**IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

**JEFFREY OSTER,**  
**Plaintiff,**

**v.**

**THOMAS M. CLEMOW, III,**  
**Defendant.**

)  
)  
)  
)  
)  
)  
)

**C.A. No. CPU4-10-007786**

Submitted: July 25, 2011

Decided: August 8, 2011

**DECISION AFTER TRIAL**

**ROCANELLI, J.**

Plaintiff Jeffrey Oster ("Plaintiff") brings this action for breach of contract against Defendant Thomas A. Clemow, III ("Defendant"). Trial took place on July 25, 2011. The parties were self-represented. Following the receipt of evidence and sworn testimony, the Court reserved decision. This is the Court's decision after trial in favor of Defendant.

**FACTS**

The Court concludes that the record supports the following findings of fact:

1. Plaintiff and Defendant entered into a contract for Plaintiff to purchase a residential property from Defendant.
2. Defendant offered to replace an exterior door because the original had a "dog-door."
3. Plaintiff accepted the offer for the exterior door to be replaced.

4. Defendant replaced the exterior door. Defendant purchased a standard-sized door at Home Depot; removed a door sweep from the bottom before cutting the door; and cut the bottom of the door with a circular saw so that the door would fit the framed opening. Defendant added weather stripping to the bottom of the door. Defendant installed the new exterior door.
5. Defendant reinforced the original framed opening of the house to accommodate the new exterior door.
6. Plaintiff inspected the door prior to closing.
7. At closing, Plaintiff requested that the screen door be reinstalled. Defendant had removed the screen door when Defendant installed the new exterior door. Defendant agreed to reinstall the screen door. An escrow agreement was signed at closing.
8. Defendant reinstalled the screen door. Defendant used a circular saw to adjust the height of the storm door.
9. Plaintiff was present when Defendant reinstalled the screen door.
10. When Defendant was reinstalling the screen door, Plaintiff mentioned to Defendant that weather-stripping on the newly installed exterior door was coming loose. Defendant offered to remove the door and reinstall weather stripping. Plaintiff declined. Instead, Defendant gave Plaintiff additional weather stripping to be installed by Plaintiff.
11. In March 2008, Plaintiff contacted Defendant to say Plaintiff was not happy with the exterior door and the screen door.

## **DISCUSSION**

This Court must decide two issues. First, the Court must determine whether Defendant is liable for breach of contract. Second, assuming

*arguendo* such liability is found, the question becomes whether damages are due and owing. The Court, as the trier of fact, must weigh the evidence as presented and make credibility determinations.<sup>1</sup> Plaintiff bears the burden to prove his claims by a preponderance of the evidence. The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.<sup>2</sup>

To state a claim for breach of contract, Plaintiff must establish three elements by a preponderance of the evidence. First, Plaintiff must prove that a contract existed. Second, Plaintiff must establish that Defendant breached an obligation imposed by the contract. Finally, Plaintiff must show that he incurred damages as a result of the breach.<sup>3</sup> Thus, the first question before this Court is whether Plaintiff established that a contract existed.

The parties do not dispute that a valid contract existed. Plaintiff purchased a home from Defendant. In connection with the real estate sale, the parties agreed that Defendant would replace the exterior kitchen door

---

<sup>1</sup> *Richardson v. A & A Air Services, Inc.*, Graves, J., 2007 WL 2473284, \*5 (Del. Super.); *see also* Delaware Superior Court Pattern Jury Instruction § 23.9 "Credibility of Witnesses -- Weighing Conflicting Testimony."

<sup>2</sup> *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).

<sup>3</sup> *VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

and reinstall the screen door. Therefore, the existence of a contract was established.

On the other hand, there is a dispute as to the second element -- whether Defendant breached any duty or obligation imposed by the contract. Plaintiff made two claims at trial. First, that the exterior door should have been solid steel. Second, that the exterior and screen doors were not installed in a “good and workmanlike manner.” Based upon the record evidence, the Court finds that Plaintiff did not establish breach of contract by a preponderance of evidence. Absent the essential element of breach, Plaintiff cannot prevail.

With respect to Plaintiff’s claim that that the exterior door installed by Defendant should have been solid steel, the Court finds that the parties did not agree that a solid steel door would be installed. Plaintiff points to the land sale contract (Plaintiff’s Exhibit B) and also relies upon his own sworn testimony. Defendant testified that the galvanized steel door that he installed met his obligations under the contract. The Court rejects the credibility of Plaintiff regarding his claim that a solid steel door should have been installed. The Court accepts the testimony of the Defendant as more

credible.<sup>4</sup> The Court finds that the galvanized steel door installed by Defendant is consistent with the parties' intentions for a replacement door (Exhibit C.) The Court will not make a better agreement for Plaintiff than he made for himself.

Regarding Plaintiff's claim that the exterior door and screen door were not installed in a "good and workmanlike manner" the Court finds that Plaintiff failed to establish this claim because he did not offer an expert witness to testify that the doors installed by Defendant did not meet construction industry standards. Plaintiff did not identify an expert witness in advance of the trial. Plaintiff did not offer any expert testimony at trial.

At 7:00 p.m. on Friday, July 22, 2011, Plaintiff moved for a continuance on the grounds that he had not been able to effect service on a "material" witness. On the morning of trial, Plaintiff amended his motion to state that the witness had been served but was not expected to appear. The Court denied Plaintiff's eleventh hour request for a continuance as untimely. Although Plaintiff claimed this witness would have been offered as an expert

---

<sup>4</sup> In a non-jury trial, the Judge, acting as the sole trier of fact, determines the credibility of witnesses and resolves conflicting testimony. *Jamison v. State*, 1995 WL 716806 at \*2 (Del. Super.) (Barron, J.). Assessing the credibility of witnesses is a matter of judicial discretion, and this Court does not abuse that discretion by choosing to give greater weight to the testimony of one party over the opposing party. *Romain v. State Farm Mut. Auto Ins. Co.*, 1999 WL 1427801 at \*2-3 (Del. Super.).

witness, the proffer made by Plaintiff related only to testimony on damages, and did not address the central issue of whether the doors had been installed in a “good and workmanlike” manner. Regardless, no such testimony was even offered because the witness did not appear.

The Court concludes that expert testimony was required to establish breach of the contract under the circumstances presented in this case. Delaware Rule of Evidence 701 provides, in relevant part:

testimony of a witness who possesses expertise in a certain area is not *ipso facto* expert testimony. . . . [A] distinction is drawn between testimony based upon one’s personal knowledge of the facts of the case, and testimony by a witness, who has been properly qualified as an expert, in the form of ‘an opinion or otherwise’ concerning a subject area relevant to the case. In short, a witness may testify as to his or her own experience, knowledge and observation about the *facts of the case* without giving ‘expert testimony’ as defined in the rules of evidence.<sup>5</sup>

Delaware Rule of Evidence 702 states that “[i]f scientific, technical or the specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.”

To determine whether a contractor’s work is performed in a workmanlike manner, the standard is whether the party “displayed the

---

<sup>5</sup> *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 835 (Del. 1995) (citations omitted).

degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities” in performing the work.<sup>6</sup> A “good faith attempt to perform a contract, even if the attempted performance does not meet the contractual requirement, is considered complete if the substantial purpose of the contract is accomplished.”<sup>7</sup> If the work is done such that a reasonable person would be satisfied by it, the work is considered completed in a satisfactory manner despite the owner’s dissatisfaction.<sup>8</sup>

Defendant is not a member of a profession or trade that installs doors. Therefore, Defendant cannot be held to the heightened workmanlike standard that would apply to a professional in the construction field. Furthermore, since no expert testimony was presented at trial, Plaintiff did not even establish the standard by which “good and workmanlike” should be applied under the circumstances presented in this case.

This Court’s finding is consistent with the Superior Court’s recent decision in *Small v. Super Fresh Food Markets, Inc.*, in which the Court addressed when expert testimony is required to establish the applicable

---

<sup>6</sup> *Gibbons v. Whalen*, 2009 WL 3014325, at \*2 (Del. Com. Pl.) (Beauregard, J.) (citing *Shipman v. Hudson*, 1993 WL 54469 \*3 (Del. Super)).

<sup>7</sup> *Id.* (citing *Nelson v. W. Hull & Family Home Improvements*, 2007 WL 1207173, at \*3 (Del. Com. Pl.)).

<sup>8</sup> *Id.* (citing *Shipman*, 1993 WL 54469 at \*3).

standard of care.<sup>9</sup> In *Super Fresh*, the plaintiff slipped in a puddle of water on the floor of the supermarket. The Court held that the plaintiff was not required to present expert testimony on the whether or not the puddle of water created a dangerous condition which breached the grocer's duty of care. The Court ruled that puddles of water on the floor are within common experience and also found that a grocer does not undergo special training in this regard. Therefore, according to *Super Fresh*, the plaintiff was not required to present expert testimony on whether a puddle of water on the floor created a dangerous condition.

In the case before the Court, Plaintiff maintained that Defendant did not install the exterior door and reinstall the screen door in a good and workmanlike manner. With respect to the exterior door, Plaintiff claimed that Defendant should not have cut the bottom of the door because doing so interfered with how the door functioned and also created a condition which led to deterioration and rust. With respect to the screen door, Plaintiff claimed that Defendant improperly installed the door without a frame which resulted in the door not closing properly. The Court finds that the quality of the installation of the doors is outside the scope of common experience and requires specialized training and knowledge in the field of construction.

---

<sup>9</sup> *Small v. Super Fresh Food Mkts., Inc.*, 2010 WL 530071, at \*3 (Del. Super.) (Cooch, J.).



Accordingly, an expert witness was required to establish what constitutes a proper door installation under the circumstances of this case.

Because the Court concludes that Plaintiff failed to meet his burden to show that Defendant breached any contractual obligation, the Court need not reach the third prong of the analysis as to whether damages are due and owing.

### **CONCLUSION**

Plaintiff did not present expert witness testimony under Delaware Rule of Evidence 702. Because no competent evidence was presented on whether Defendant failed to install the doors in a good and workmanlike manner, Plaintiff failed to establish that Defendant breached any contractual obligation owed to Plaintiff. Accordingly, Plaintiff's claim for breach of contract must fail.

**Therefore, JUDGMENT IS HEREBY ENTERED ON BEHALF OF DEFENDANT AND AGAINST PLAINTIFF.**

**IT IS SO ORDERED.**

*Andrea L. Rocanelli*

---

The Honorable Andrea L. Rocanelli

